DEC 30 1999

Nos. 99-5; 99-29

Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,

Respondents,

CHRISTY BRZONKALA,

Petitioner,

v.

ANTONIO J. MORRISON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER CHRISTY BRZONKALA

MARTHA F. DAVIS*
JULIE GOLDSCHEID
RISA E. KAUFMAN
NOW LEGAL DEFENSE AND EDUCATION FUND
395 Hudson Street, 5th floor
New York, New York 10014
(212) 925-6635

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
KATHERINE L. ADAMS
PAUL A. HEMMERSBAUGH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

EILEEN N. WAGNER
4906 Fitzhugh Avenue
Suite 201
Richmond, Virginia 23230
(804) 359-1169

Counsel for Petitioner

December 30, 1999

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. THE CIVIL RIGHTS REMEDY IS A NECESSARY AND PROPER EXERCISE OF CONGRESS' AUTHORITY TO REGULATE INTRASTATE ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE..... 1

A. The Four Factors Identified By Petitioner Implement The Limits Of The Necessary And Proper Clause And Support The Civil Rights Remedy's Constitutionality 2

1. The Civil Rights Remedy, Like Other Civil Rights Statutes, Combats Conduct That Creates A Substantial, Discriminatory Barrier To Participation In The National Economy 3

2. Congress Reasonably Found That Gender-Motivated Violence Substantially Affects Interstate Commerce 5

3. Congress Reasonably Found That The States Have Not Effectively Addressed The National Problem Of Gender-Motivated Violence..... 9

4. Congress Carefully Limited The Civil Rights Remedy To Minimize Intrusion On State Sovereignty, Avoid Displacement Of State Programs, And Preserve States' Ability To Address Gender-Motivated Violence..... 10

B. In Any Event, Respondents Have Not Established A Basis For Facial Invalidation Of The Civil Rights Remedy..... 12

TABLE OF CONTENTS – Continued

Page

II. SECTION 5 CONSTITUTIONALLY ENFORCES EQUAL PROTECTION RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 7

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 12, 13

Brzonkala v. *Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir. 1999) (*en banc*) 14

Brzonkala v. *Virginia Polytechnic*, 935 F. Supp. 779 (W.D. Va. 1996)..... 14

Chiarella v. *United States*, 445 U.S. 222 (1980) 13

City of Boerne v. *Flores*, 521 U.S. 507 (1997)... 15, 17, 20

City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) 6

Civil Rights Cases, 109 U.S. 3 (1883) 16, 17, 18, 19

Conley v. *Gibson*, 355 U.S. 41 (1957) 13

District of Columbia v. *Carter*, 409 U.S. 418 (1973) 19

FCC v. *Beach Communications, Inc.*, 508 U.S. 307 (1993) 9

Florida Prepaid Postsecondary Educ. Expense Bd. v. *College Sav. Bank*, 119 S. Ct. 2199 (1999).....6, 16

Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 1

Griffin v. *Breckenridge*, 403 U.S. 88 (1971) 16, 17, 18

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 8

Hodel v. *Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).....7, 9

TABLE OF AUTHORITIES – Continued

Page

Katzenbach v. *McClung*, 379 U.S. 294 (1964) 3, 8

Katzenbach v. *Morgan*, 384 U.S. 641 (1966).....19, 20

Los Angeles Police Dep't v. *United Reporting Publ'g Corp.*, 120 S. Ct. 483 (1999) 12, 13, 14

Mulford v. *Smith*, 307 U.S. 38 (1939) 8

New York v. *United States*, 505 U.S. 144 (1992) 1

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)..13, 14

Patsy v. *Board of Regents*, 457 U.S. 496 (1982) 16

Perez v. *United States*, 402 U.S. 146 (1971) 9

Printz v. *United States*, 521 U.S. 898 (1997)..... 1

Romer v. *Evans*, 517 U.S. 620 (1996) 6

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943)..... 7

United States v. *Guest*, 383 U.S. 745 (1966) 18, 19

United States v. *Harris*, 106 U.S. 629 (1883) ...17, 18, 19

United States v. *Lopez*, 514 U.S. 549 (1995) ..... *passim*

FEDERAL STATUTE

42 U.S.C. § 13981.....8, 18, 19

LEGISLATIVE HISTORY

H.R. Conf. Rep. No. 103-711 (1994) 7, 8

H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391 4

S. Rep. No. 101-545 (1990) 4

TABLE OF AUTHORITIES – Continued

Page

S. Rep. No. 103-138 (1993) 4, 10

Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary, 102d Cong. (1991) 16

COURT RULE

Sup. Ct. R. 15.2 13

OTHER AUTHORITY

Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921)..... 3

I. THE CIVIL RIGHTS REMEDY IS A NECESSARY AND PROPER EXERCISE OF CONGRESS' AUTHORITY TO REGULATE INTRASTATE ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE.

This Court has made clear that Congress' power under the Commerce Clause to regulate intrastate activity that "substantially affects" interstate commerce is derived from and limited by the text of the Necessary and Proper Clause. See, *e.g.*, *New York* v. *United States*, 505 U.S. 144, 158 (1992); *accord Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting); Brzonkala Br. 36. Indeed, Respondent Morrison concedes this, stating that it is the Necessary and Proper Clause that "permits Congress to reach intrastate commerce that 'substantially affects' interstate commerce." Morrison Br. 33.[1]

Respondents err, however, in asking this Court to substitute for the Necessary and Proper test set forth in the Constitution itself, a requirement that the intrastate activity be "economic." Respondents propose a rigid bright line rule that would bar congressional regulation of any and all intrastate activity that is not "economic," no matter how substantial, large and debilitating the effects of that activity on the national economy and interstate commerce. See, *e.g.*, Crawford Br. 21 ("Congress

---

[1] Indeed, the sole recent case Respondents cite addressing the Necessary and Proper Clause, *Printz* v. *United States*, 521 U.S. 898 (1997), actually supports Brzonkala's position that the Clause provides meaningful limits. See Morrison Br. 32. There, the Court struck a congressional regulation that, unlike here, commandeered state law enforcement personnel to enforce a federal law regulating commercial activity, finding that it was not "proper" under the Necessary and Proper Clause because it unduly intruded on state sovereignty. *Printz*, 521 U.S. at 923-24; *see infra* at 10-12.

cannot regulate conduct wholly non-economic in nature."); Morrison Br. 14-15. Such extreme formalism is not only contrary to this Court's precedents, it is impractical and would disable Congress from protecting the national economy and interstate commerce from current and future threats.

The only argument Respondents muster to support their extreme position is the assertion that Petitioner's position lacks principled and meaningful limits on the commerce power and is therefore equally extreme. See, *e.g.*, Morrison Br. 33-35; Crawford Br. 20-25. However, the limits Petitioner Christy Brzonkala ("Brzonkala") has articulated are principled and significant, respect federalism principles, and are supported by the text of the Constitution and this Court's Commerce Clause decisions.

A. The Four Factors Identified By Petitioner Implement The Limits Of The Necessary And Proper Clause And Support The Civil Rights Remedy's Constitutionality.

The four factors identified by Brzonkala establish meaningful limits on Congress' power to regulate non-economic activity under the Commerce Clause. Brzonkala Br. 22-35. Together, those four factors help implement the textual limitations prescribed by the Necessary and Proper Clause, and preserve the dual sovereignty that is the genius of our federal system.

Two preliminary points deserve reemphasis. *First*, consistent with *United States* v. *Lopez*, 514 U.S. 549 (1995), the four factors help ensure that the occasions in which Congress may regulate non-economic intrastate activity are relatively rare compared to the occasions when Congress may regulate economic intrastate activity under the Commerce Clause. *Second*, contrary to Respondents' suggestion, Brzonkala does not maintain that the presence of

any single factor alone would be sufficient to sustain congressional regulation of non-economic activity. Brzonkala Br. 22. Rather, under the appropriate practical approach, *Lopez*, 514 U.S. at 572-73 (Kennedy, J., concurring), the Court should evaluate the collective weight of the combined factors on a case-by-case basis.[2] Because all four factors strongly support the Civil Rights Remedy, it is properly within the meaningful limits on federal power established by the Constitution.

1. The Civil Rights Remedy, Like Other Civil Rights Statutes, Combats Conduct That Creates A Substantial, Discriminatory Barrier To Participation In The National Economy.

The inquiry whether a statute is intended to address discriminatory activity that creates a barrier to the full participation of a specific group in interstate commerce and the national economy helps to implement both elements of the Necessary and Proper Clause. Federal regulation of discriminatory activity is *proper* because civil rights legislation is a traditional responsibility of the federal government. Such legislation is also *necessary* to the full and free flow of commerce. See *Katzenbach* v.

---

[2] Crawford quotes Justice Cardozo but ignores that he was this century's great opponent of legal formalism. Crawford Br. 22 n.5. As Justice Cardozo stated: "We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees." Benjamin N. Cardozo, *The Nature of the Judicial Process* 102, 161 (1921). Justice Cardozo thus warned that judges should be on guard against "times when the demon of formalism tempts the intellect with the lure of scientific order." *Id.* at 66, 90. He specifically warned that courts must not use formalistic rules to substitute their judgment for that of the legislature: "One department of the government may not force upon another its own standards of propriety." *Id.* at 90 (internal citations omitted).

McClung, 379 U.S. 294, 302 (1964) (anti-discrimination statute could reach activities "which directly or indirectly burden or obstruct interstate commerce"). As Congress found here and in the 1964 Civil Rights Act, because discriminatory conduct singles out a particular group of people, members of that group are very likely to take such discrimination into account when determining whether – and where – to engage in economic activity. Compare *id.* at 300 ("discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there"),[3] with S. Rep. No. 101-545, at 43 (1990) ("Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, . . . and reduces consumer spending, all of which affect interstate commerce and the national economy"), and S. Rep. No. 103-138, at 54 (1993) ("[e]ven the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence"); see also Brzonkala Br. 7-8, 10-13, 23-26.

This first factor constitutes a significant limitation on federal power because it supports only legislation designed to protect a specific group from discrimination.

---

[3] The legislative history of the Civil Rights Act of 1964 shows that Congress was responding to the effects of discrimination on the broader economy, not simply to whether or not the conduct it sought to regulate was itself economic. *See, e.g.*, H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2498 (views of Republican members in support of bill) (racial disputes and discrimination had negative effect on business conditions generally, including investment choices and business opportunities, *e.g.*, plants and companies deciding not to locate in Southern cities).

Non-discriminatory barriers to commerce, such as inadequacies in general education programs, fall outside this factor's scope.

Contrary to Respondents' assertion, the GFSZA in *Lopez* did not satisfy this factor because it did not involve discrimination, *i.e.*, the possession of a gun near a school does not discriminate against any particular group. For the same reason, the "parade of horribles" trotted out by Respondents and their *amici*, including a national murder or wrongful death law, and laws addressing insomnia and the like, would not be supported by this factor. The Civil Rights Remedy, which plainly is anti-discrimination legislation, squarely fits. See Brzonkala Br. 7-8, 10-13, 23-26.

2. Congress Reasonably Found That Gender-Motivated Violence Substantially Affects Interstate Commerce.

Whether Congress had a reasonable basis for determining that the activity at issue, "whatever its nature," substantially affects interstate commerce, lies at the heart of the Commerce Clause analysis. See *Lopez*, 514 U.S. at 556 ("[e]ven if [an] activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce") (emphasis added); *id.* at 557 (Court reviews whether Congress had "rational basis"); *id.* at 559; *accord* Morrison Br. 14, 22 n.6.

Respondents argue that this factor simply does not apply when the activity is non-economic. Crawford Br. 21; Morrison Br. 14. Thus, under Respondents' proposed rule, Congress would be powerless to address even dire national emergencies that were devastating to the economy, if the underlying activity were not "economic." For example, if a potent virus were spreading rapidly within many states, threatening – like the influenza epidemic of

1918-19 – to kill millions of citizens and devastate the national economy, and the States were unable effectively to combat this virus, Congress could not regulate to combat the virus, because neither the disease nor its spread is an "economic" activity.

Not only does the "substantially affects" factor apply to regulation of non-economic activity, it also helps to implement the "necessary" limitation of the Necessary and Proper Clause. As Respondents concede, the requirement that Congress make a *reasonable* determination imposes a meaningful limitation on federal power. *See* Morrison Br. 27 (citing, *inter alia, Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 119 S. Ct. 2199 (1999)). In addition to *Lopez*, this Court has on several recent occasions struck laws as unconstitutional under rational basis review. See, *e.g.*, *Romer* v. *Evans*, 517 U.S. 620, 634-36 (1996); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985).

Respondents also misconstrue Petitioner's argument concerning congressional findings. Brzonkala does *not* contend that Congress is *required* to make findings in order to support an exercise of its commerce power. Rather, as *Lopez* recognized, the presence of express congressional findings, like those supporting the Civil Rights Remedy, can help the Court find that Congress had a reasonable basis for its conclusion that the regulated activity substantially affects interstate commerce. See *Lopez*, 514 U.S. at 563. Put another way, it is easier for this Court to defer to Congress' reasonable exercise of its "substantial discretion," *id.* at 577 (Kennedy, J., concurring), when there is a record that such discretion was, in fact, exercised.

Contrary to Respondents' contention, the Court in *Lopez* unequivocally stated that " '[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.' " *Id.* at 562 (quoting

United States brief).[4] Respondents refer to subsequent Congressional findings made nearly four years after the GFSZA's enactment. See Morrison Br. 24-25 n.9. But the fact that the Congress that enacted the GFSZA did not exercise an informed "discretion," *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring), can not be changed by the post-hoc rationalizations of a subsequent Congress. Cf. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (reasonableness of agency regulations may not be defended based on agency's post-hoc rationalizations); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 92-95 (1943) (agency may not support reasonableness of decision based on subsequent conclusions that did not form the basis for decision). *Lopez* made clear that the government properly did "not rely upon these subsequent findings as a substitute for the absence of findings in the first instance." 514 U.S. at 562 & 563 n.4.

In contrast, the findings supporting the Civil Rights Remedy are contemporaneous, thorough, supported by empirical data, and eminently reasonable. Although Respondents level various criticisms at selected portions of the congressional findings, and make clear that they disagree with Congress' policy decision, at no point do they argue that it was *unreasonable* for Congress to find that gender-motivated violence against women substantially affects the economy and interstate commerce. Rather, the four-year legislative record and findings supporting the Civil Rights Remedy amply demonstrate that the adverse effects on interstate commerce of gender-motivated violence are "substantial." H.R. Conf. Rep. No. 103-711, at 385 (1994) ("1994 Conf. Rep."); Brzonkala Br. 10-13; cf. *Hodel* v. *Virginia Surface Mining & Reclamation*

---

[4] Moreover, as the Court made clear, there was no reasonable basis for concluding that mere *possession* of a gun *near* a school has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 563-67.

Ass'n, 452 U.S. 264, 277-80 & n.19 (1981) (upholding statute after reviewing six-year legislative record).

Respondents' assertions that some supporters of the Civil Rights Remedy sought to combat morally opprobrious conduct are irrelevant. See Morrison Br. 2-5; Crawford Br. 5-8. For example, *Heart of Atlanta Motel* v. *United States* expressly holds that the fact that a civil rights law also "legislat[es] against a moral wrong" in no way lessens the legitimate scope of the commerce power. 379 U.S. 241, 257 (1964); *see also Mulford* v. *Smith*, 307 U.S. 38, 48 (1939) ("The motive of Congress in exerting the [Commerce Clause] power is irrelevant to the validity of the legislation.") (citing J. Story, *Commentaries on the Constitution* §§ 965, 1079, 1081, 1089 (4th ed.)).

Surprisingly, Morrison criticizes the Civil Rights Remedy for regulating too narrowly, contending that "gender-motivated" violence does not itself, as a "subset" of violence against women, substantially affect interstate commerce. See Morrison Br. 4, 23-24. Morrison ignores that Congress expressly and reasonably found that gender-motivated violence constitutes a significant, and particularly intractable and pernicious, portion of all violence against women, and thus that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce." 1994 Conf. Rep. 385; see also 42 U.S.C. § 13981(a) (purpose of Civil Rights Remedy is "to protect the civil rights of victims of gender motivated violence and [thus] promote . . . activities affecting interstate commerce"); Brzonkala Br. 10-11, 26 (quoting legislative history that "[g]ender-based violence bars its most likely targets – women – from full participation in the national economy"). Moreover, no such finding is required. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. at 304-05 (rejecting challenge to 1964 Civil Rights Act based on the "absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food").

If anything, federalism is advanced by Congress' limitation of the Remedy to where the need is most acute and any potential intrusion on state functions most limited. It is well-established that Congress may address the core portion of a problem, and is not required to address all aspects of a broader problem simultaneously. See, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 316 (1993) ("Scope of coverage provisions are unavoidable components of most economic or social legislation. . . . [T]he legislature must be allowed leeway to approach a perceived problem incrementally"). Federalism would have to be turned on its head to invalidate the Civil Rights Remedy because it is not broad enough.

3. Congress Reasonably Found That The States Have Not Effectively Addressed The National Problem Of Gender-Motivated Violence.

The third factor, whether Congress reasonably found that the States are unable to address the problem posed by the activity, helps to implement the "necessary" component of the Necessary and Proper Clause and provides further principled and significant limits on congressional power. See *Perez* v. *United States*, 402 U.S. 146, 150 (1971) (relying on factor that "[t]he problem simply cannot be solved by the States alone"); *Hodel*, 452 U.S. at 280 (relying on "inadequacies in existing state laws"). Congress could not reasonably find, for exampie, that state criminal remedies for murder or tort remedies for wrongful death are generally inadequate.

The empirical evidence before Congress readily supports its conclusion that the States had not effectively confronted and addressed the problem of gender-motivated violence. See Brzonkala Br. 13-17, 30-31. In addition to formal and informal barriers in state justice systems, Congress found proof of systemic discrimination by the

States, including, to cite just one example, that "a rape case is more than twice as likely to be dismissed as a murder case and nearly 40 percent more likely to be dismissed than a robbery case," and that, even when convicted, "over one-half of all convicted rapists serve . . . 1 year or less in prison." S. Rep. No. 103-138, at 42 (1993). Moreover, as 36 State Attorneys General argue in this case: [t]he States' own assessments of their legal responses to violence against women demonstrate that state protections remain inadequate, and thus support congressional enactment [of the Remedy]." Brief of Arizona, et al. in Support of Petitioners, 15-16; *accord id.* at 2, 15-20. It has been recognized – from the creation of diversity jurisdiction through enactment of federal criminal and civil actions for corruption and misconduct by state officials – that the safeguards of the federal system are well-suited to combat biases when they are regrettably present in state-court adjudication. See Brzonkala Br. 31.

4. Congress Carefully Limited The Civil Rights Remedy To Minimize Intrusion On State Sovereignty, Avoid Displacement Of State Programs, And Preserve States' Ability To Address Gender-Motivated Violence.

By requiring an assessment of the degree to which congressional regulation intrudes on state sovereignty or displaces state programs or States' ability to address a problem, the fourth factor helps implement the "proper" element of the Necessary and Proper Clause. It provides a meaningful and principled limit on congressional power by proscribing congressional regulation that unduly intrudes on state functions. See, *e.g.*, *supra* at 1 n.1. Moreover, this factor preserves and protects the system of dual sovereignty that lies at the heart of our federal system, including the role of the States as "laboratories for experimentation." See *Lopez*, 514 U.S. at 574-77, 580-81 (Kennedy, J., concurring).

As Justices Kennedy and O'Connor emphasized in their concurring opinion in *Lopez* (the "Kennedy-O'Connor concurrence"), this fourth factor is an important consideration in determining whether congressional regulation of non-economic activity is within the limits of the commerce power. See *id.* at 580 (Kennedy, J., concurring) (where Congress seeks to regulate activity that is not directly of a "commercial character," a reviewing court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern").

Lopez itself illustrates that this fourth factor imposes a significant limit on congressional power. Contrary to Respondents' contention, the GFSZA did intrude on state functions and interfere with States' ability to effectively implement state programs to curb the abuse of firearms. These included programs to encourage "voluntary surrender of guns with some provision for amnesty," and inducements and incentives "to inform on violators," who would be subject to suspension or expulsion, but not criminal sanction. *Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring). The Kennedy-O'Connor concurrence made clear that an important factor in their conclusion was the degree to which the GFSZA displaced state regulation and "foreclose[d] the States from experimenting and exercising their own judgment in an area in which States lay claim by right of history and expertise," education. *Id.* at 583.

Respondents' contention that the degree of intrusion on state functions should be ignored would elevate formalism over the pragmatic substance of genuine federalism concerns. See, *e.g.*, Crawford Br. 27-28; Morrison Br. 30. Indeed, this contention ignores the express statement in the Kennedy-O'Connor concurrence that the Court should not strike down a federal statute on Commerce Clause grounds absent an "intrusion on state sovereignty" that is "significant." *Lopez*, 514 U.S. at 583.

By contrast, the Civil Rights Remedy provides a limited federal remedy for the national problem of gender-motivated violence, while carefully preserving state sovereignty and functions, and leaving ample room for additional state efforts to address the problem. Contrary to Respondents' contention, Crawford Br. 31-33, the Civil Rights Remedy leaves state criminal and tort laws undisturbed. The Remedy requires proof of particular statutory elements that render it distinct from general torts under state law. When state-law criminal prosecutions or state-law tort claims are brought, state laws restricting those remedies will not be pre-empted and will continue to have the same effect they had before the Civil Rights Remedy's enactment.[5]

B. In Any Event, Respondents Have Not Established A Basis For Facial Invalidation Of The Civil Rights Remedy.

As this Court has recently made clear, "[t]he traditional rule is that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.' " *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 120 S. Ct. 483, 488 (1999) (quoting *New York* v. *Ferber*, 458 U.S. 747, 767 (1982)). *See also Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973). Indeed, it is questionable whether, because of the "personal nature of constitutional rights"

---

[5] The broad area of intentional wrongdoing is not the exclusive province of state law. Although common law torts cover broad areas of intentional wrongdoing, numerous federal laws, like the Civil Rights Remedy, provide for civil statutory liability for intentional misconduct in specific areas, including, for example federal securities law, antitrust law, 42 U.S.C. § 1983, and civil RICO claims.

and "the prudential limitations on constitutional adjudication," the Court recognizes any basis for a facial constitutional challenge other than in the limited context of First Amendment overbreadth claims. *Los Angeles Police Dep't*, 120 S. Ct. at 489.[6]

As explained, Brzonkala Br. 41-42, the conduct alleged in this case involves a direct effect on economic activity, *i.e.*, the assault on Brzonkala prevented her enjoyment of the services and benefits from Virginia Tech for which she had contracted and paid. Because this case was decided on a Rule 12(b)(6) motion, her allegations must be liberally construed and accepted. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Respondents make an impermissible facial challenge by relying on the specter of other, hypothetical, applications that they contend would offend federalism principles, Crawford Br. 31-33, but that they concede are not at issue here.[7]

For example, if a state statute codified the tort of libel and exceeded the limits of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny by allowing damages for "any false statement," this Court would not even

---

[6] Whether Respondents may raise a facial challenge to the Civil Rights Remedy is a standing issue and is thus properly before the Court. *See Broadrick*, 413 U.S. at 610-12. Moreover, Brzonkala raised the impropriety of a facial challenge in her Petition for Certiorari. Pet. 17 n.14. Respondents did not object in their Oppositions to Certiorari; any objection should therefore be deemed waived. Sup. Ct. R. 15.2.

[7] In contrast, the GFSZA was unconstitutional as applied in *Lopez*, and no argument was raised at that time or since that the statute would be constitutional under other circumstances. Moreover, the case against Lopez was not tried in the district court on the theory that his particular activity had a direct economic effect, *Lopez*, 514 U.S. at 551, 561-68, and it would have violated due process to affirm a criminal conviction on a different basis than that used in the trial court. *Chiarella* v. *United States*, 445 U.S. 222, 236-37 (1980).

consider striking that statute facially in a case where the facts presented a permissible application (*i.e.*, an application within the limits prescribed by *New York Times*). The statute in this case should be addressed similarly. As *Los Angeles Police Dep't* makes plain, the process of case-by-case adjudication is the constitutional norm and, contrary to Morrison Br. 19, is not akin to rewriting the statute.[8]

II. SECTION 5 CONSTITUTIONALLY ENFORCES EQUAL PROTECTION RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Brushing to the side the flotsam and jetsam of Respondents' many tangential contentions concerning Congress' Section 5 authority to enact the Civil Rights Remedy, Respondents set forth three basic arguments: 1) no equal protection violations are at issue; 2) the Remedy is not congruent or proportionate; and 3) Congress cannot regulate private action under Section 5. None of these arguments cast doubt on the Civil Rights Remedy's constitutionality.

First, the legislative record leading to the Civil Rights Remedy's enactment clearly identified equal protection

---

[8] Crawford incorrectly argues that the constitutional issue can be avoided because Brzonkala's Amended Complaint failed to state a claim under the statute itself against Morrison or Crawford. Crawford Br. 38-40. The Court must reach the constitutional issue if a claim was stated as to Morrison, and each of the lower court judges correctly concluded that Brzonkala had, in fact, stated a claim of gender-motivation against at least Morrison. *Brzonkala v. Virginia Polytechnic*, 935 F. Supp. 779, 784-85 (W.D. Va. 1996); *Brzonkala* v. *Virginia Polytechnic Inst.*, 169 F.3d 820, 829-30 (4th Cir. 1999) (*en banc*); *id.* at 909 (Motz, J., dissenting). We will not dignify with a response Crawford's explanation that Morrison's statement that Brzonkala "better not have any fucking diseases" was an expression of "concern for self-preservation." Crawford Br. 40.

violations warranting Section 5 legislation. Respondents offer no analysis of why the stark examples of states' disparate and discriminatory treatment of victims of gender-based crimes, comprised in large part of the States' own studies and testimony, see Brzonkala Br. 13-17, 42-45; United States Br. 7-10, 38-40, are different from the record of equal protection violations this Court recently indicated is sufficient to support enforcement clause legislation. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 518, 525-27 (1997) (citing *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); and *City of Rome* v. *United States*, 446 U.S. 156 (1980)). They fail even to mention Congress' record of the state gender bias task force findings, and do not contest that the record of states' discriminatory treatment and practices reflect the very kind of outdated stereotypes that fully support a finding of equal protection violations. See Brzonkala Br. 43-45; United States Br. 38-42. Respondents instead rest on the bald assertion that the record of discriminatory treatment of victims of gender-based crimes is not sufficient. Morrison Br. 44-45. However, even the court below conceded that the record "does establish that the States enforce and apply certain laws in a manner that may ultimately prevent the victims of gender-motivated violence from obtaining vindication through the criminal or civil systems." Pet. App. 153a.

Second, the civil rights statute Congress crafted is congruent and proportionate to the equal protection violations it identified, granting an alternative method of recovery for the very violent crimes Congress found states were treating in a discriminatory manner. See Brzonkala Br. 45-48; United States Br. 43-45. The logic behind this remedy is identical to that underlying numerous other federal damages remedies for civil rights violations, such as 42 U.S.C. §§ 1981, 1982, 1983, and especially 1985(3), which, like the Remedy, authorizes

civil damages for bias-motivated violence.[9] In addition, the Remedy is congruent and proportionate because federal civil rights suits arising from domestic violence or sexual assault cases can spur important reform. See, *e.g.*, *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. 125 (1991) (statement of Gill Freeman, Chair, Florida, Supreme Court Gender Bias Study Implementation Commission) (stating that the Civil Rights Remedy will "increase the responsiveness of the states").

Morrison essentially objects that a congruent response would require a showing of state-sponsored discrimination in each case. Morrison Br. 47. But it is well established that Section 5 authorizes prophylactic legislation regulating conduct that itself does not violate the Constitution. *Florida Prepaid Postsecondary Educ.*, 119 S. Ct. at 2206 (citing *Boerne*, 521 U.S. at 517-18). The Civil Rights Remedy is an appropriate response because it avoids the intrusion that would occur from a suit against local law enforcement, see *Griffin* v. *Breckenridge*, 403 U.S. 88, 101 (1971), while still "correcting the effects" of States' discriminatory treatment by providing redress for victims of gender-motivated crime. See *Civil Rights Cases*, 109 U.S. 3, 13-14 (1883).

Contrary to Morrison's accusations that the law is overbroad and would amount to a general police power, Morrison Br. 48-49, the Civil Rights Remedy contains important limitations that "ensure Congress' means are

---

[9] Indeed, Morrison contradicts his own argument by citing cases demonstrating that federal civil rights laws can provide an essential remedy when state law enforcement has proved unable to address bias-motivated violence. *See* Morrison Br. 38 (citing *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 713-27 (1989) (recounting legislative history of 42 U.S.C. §§ 1981, 1983); *Patsy v. Board of Regents*, 457 U.S. 496, 502-06 (1982) (legislative history of 42 U.S.C. § 1983)).

proportionate" to legitimate ends. *Boerne*, 521 U.S. at 532-33. By requiring proof of "gender-motivation" by the perpetrator in each case, the Remedy stays far away from the "constitutional shoals" of "a general federal tort law." *Griffin*, 403 U.S. at 102. Even if, as Morrison asserts, gender bias infects federal as well as state courts, Morrison Br. 48, an alternative forum removed from local politics may provide the only vehicle for meaningful relief, particularly in cases where familiarity compounds bias. See Brzonkala Br. 46. Only a federal law can ensure uniform enforcement of civil rights laws nationwide.

Third, neither *United States* v. *Harris* nor the *Civil Rights Cases* establish an absolute bar on regulating private conduct under Section 5 where, as here, Congress was responding to discriminatory state action. *United States v. Harris*, 106 U.S. 629 (1883); *Civil Rights Cases*, 109 U.S. 3 (1883).[10] Instead, the Court found both statutes impermissibly overbroad under the Thirteenth as well as the Fourteenth Amendments.[11] If the statutes' regulation of private conduct was the sole reason the Court rejected them under Section 5, they could have been upheld under the Thirteenth Amendment, which, unlike Section 5, can support direct congressional regulation of private conduct absent a link with discriminatory state action. See *Civil Rights Cases*, 109 U.S. at 23. That the Court rejected both statutes under the Thirteenth Amendment as well

---

[10] Respondents imply that this Court recently has issued unqualified endorsements of these cases. Crawford Br. 38; Morrison Br. 40-41. However, this Court recently stated that "the specific holdings of these early cases might have been superseded or modified," while citing them for the proposition that Section 5 authority is "corrective" rather than "definitional," an issue not presented in this case. *Boerne*, 521 U.S. at 525.

[11] *Harris*, 106 U.S. at 639-40, 642-43; *Civil Rights Cases*, 109 U.S. at 14-19, 20-25.

confirms that it was the particular statutes' construction – not their regulation of private conduct – that was determinative.[12]

In finding both statutes overbroad under Section 5, the Court identified infirmities not present in the Civil Rights Remedy. In *Harris*, the Court was particularly concerned that the statute encompassed generic crimes entirely unrelated to the state-sponsored discrimination with which it was concerned, including a "conspiracy between two free white men against another free white man." 106 U.S. at 641. While the Court in the *Civil Rights Cases* endorsed the principle that Section 5 authorized corrective legislation such as the Civil Rights Remedy at issue here to counteract equal protection violations by the States, it struck the particular statute because it made "no reference whatever to any supposed or apprehended" equal protection violation, and presumed that private individuals could violate the Constitution. 109 U.S. at 13-14, 17.

By contrast, Congress explicitly intended the Civil Rights Remedy to correct state-sponsored discrimination in state justice systems, see, *e.g.*, Brzonkala Br. 13-17, 45-48, and crafted particular provisions directly addressing those violations. See, *e.g.*, 42 U.S.C. § 13981(e)(2) (permitting suits whether or not there was a criminal complaint, prosecution, or conviction, in response to congressional findings that States' discriminatory practices lead to low rates of reporting, prosecution and conviction

---

[12] Indeed, the Court subsequently upheld 18 U.S.C. § 241, the modern-day version of the law struck in *Harris*, which authorizes prosecutions for private conspiracies that violate civil rights, *United States v. Guest*, 383 U.S. 745 (1966), as well as 42 U.S.C. 1985(3), the civil counterpart to the criminal law struck in *Harris*, which tracks the older criminal provision's precise language, and which authorizes a private cause of action for conspiracies to violate civil rights. *Griffin*, 403 U.S. 88 (1971).

of gender-based crimes). Unlike the earlier statutes, the Remedy is responsive and tailored to the state-justice system bias with which Congress was concerned. Indeed, it is explicitly inapplicable to the "random" acts of violence found problematic in *Harris* because it is statutorily limited to cases in which the violence was gender motivated. *Id.* § 13981(e)(1).[13]

Finally, Respondents seem blindered to cases far more recent than *Harris* and the *Civil Rights Cases*, which squarely endorse Congress' authority to regulate private conduct under Section 5 under appropriate circumstances. Rather, Respondents defer solely to the court of appeals' decision, see Morrison Br. 43, which dismissed that recent authority, including a unanimous Court in *District of Columbia* v. *Carter*, 409 U.S. 418, 423 n.8 (1973), and six Justices in *Guest*, 383 U.S. at 762 (Clark, J, concurring); *id.* at 782 (Brennan, J., dissenting). The Court here need not reach the precise issue addressed in those cases, whether Congress may regulate purely private conduct with no connection to state action, because Congress here found sufficient discriminatory state action to warrant Section 5 legislation. Nonetheless, as just one example of the lower court's misguided reasoning, the court of appeals dismissed *District of Columbia* because it cited *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), on the basis that *Morgan* had endorsed a substantive theory of Section 5 authority that this Court in *Boerne* subsequently rejected. Pet. App. 140a-141a. But *District of Columbia* did not cite

---

[13] Respondents' reliance on the legislative history of the statutes rejected in *Harris* and the *Civil Rights Cases* leads to no different result. *See* Morrison Br. 37-41; Crawford Br. 36-37. That the statutes in *Harris* and the *Civil Rights Cases* were deemed insufficiently connected to state action to warrant Section 5 legislation does not control the result in this case, which involves a markedly distinct statute.

Morgan for that theory, and the Court recently cited *Morgan* with approval. See *Boerne*, 521 U.S. at 518.

In sum, Respondents' arguments fail to undermine the record here, in which Congress carefully crafted a narrow remedy tailored to redress equal protection violations that deny victims of gender-based violence meaningful access to justice.

CONCLUSION

The opinion of the Fourth Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

MARTHA F. DAVIS*
JULIE GOLDSCHEID
RISA E. KAUFMAN
NOW LEGAL DEFENSE AND EDUCATION FUND
395 Hudson Street, 5th floor
New York, New York 10014

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN
KATHERINE L. ADAMS
PAUL A. HEMMERSBAUGH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006

EILEEN N. WAGNER
4906 Fitzhugh Avenue
Suite 201
Richmond, Virginia 23230
(804) 359-1169

Counsel for Petitioner

December 30, 1999

**Counsel of Record*